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PARKS AND WILDLIFE DEPARTMENT**  
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November 7, 1995

Honorable Dan Morales  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

Subject: Request for Opinion

Dear General Morales:

I am seeking guidance on the application of the criminal trespass law to situations involving fishing, hunting, and other activities taking place in a boat floating in public waters over privately-owned submerged property.

Navigation of the state's inland and coastal waters is a public right and duty recognized by the state constitution since 1917, Tex. Const. Art. 16, Sec. 59 (a). Court cases and Attorney General Opinions have established that it is not a trespass for a boat, floating in public waters, to occupy a position over private, submerged property, Diversion Lake Club v. Heath, 86 S.W.2d 441 (Tex. 1935); A.G. Op. M-1210 (1972); A.G. Op. H-68 (1973). This same body of law has also established that the public may lawfully fish in public waters which lie over private, submerged land. By "public waters" I mean waters which are subject to the ebb and flow of the tides, waters of navigable streams and other state-owned streambeds, and lakes formed by damming the waters of a state-owned streambed. See Diversion Lake Club v. Heath; Heard v. Town of Refugio, 103 S.W.2d 728 (Tex. 1937); A.G. Op. DM-169 (1992). These waters are the property of the state, Water Code Sec. 11.021 (a).

The Parks and Wildlife Commission has declared an open season on migratory game birds, during which the birds may be hunted from a floating craft which is beached, at anchor, or tied within or alongside a fixed hunting blind, 31 TAC Secs. 65.312 (a)(3); 65.332 (a)(3). It is, of course, lawful to fish from a boat in public waters, subject to state statutes and the regulations of the Parks and Wildlife Commission. Hunting and fishing have been held to be reasonable uses of navigable waters, Welder v. State, 196 S.W. 868 at 873 (Tex. Civ. App. - Austin 1917, writ ref'd); Dincans v. Keeran, 192 S.W. 603 (Tex. Civ. App. - San Antonio 1917, no writ); Diversion Lake Club v. Heath, 86 S.W.2d at 444. Other authorities which address boating and fishing rights include Taylor Fishing Club v. Hammett, 88 S.W.2d 127 (Tex. Civ. App. - Waco 1935, writ dism'd); Port Acres Sportsman's Club v. Mann, 541 S.W.2d 847 (Tex. Civ. App. - Beaumont 1976, writ ref'd. n.r.e.); and A.G. Op. S-208 (1956).



Entry on property of another without effective consent constitutes the offense of criminal trespass, if the actor had notice that the entry was forbidden. "Entry" means the intrusion of the entire body, Penal Code Art. 30.05. Law enforcement officers of the Parks and Wildlife Department are authorized to enforce this, and other criminal laws, Parks and Wildlife Code Secs. 11.019; 11.0191; Code Crim. Pro. Arts. 2.12 (10); 14.01 (b).

With this background in mind, my questions are as follows:

(1) A person in a boat floating on public waters beaches the boat on submerged private property for purposes of hunting or fishing from the boat. By "beached," I mean the bottom of the boat is in contact with and partially supported by the privately owned submerged land, but still partially supported by the water. The boat is steered into position and the beaching is accomplished without leaving the boat. Has the person committed an entry onto private property within the meaning of the criminal trespass statute?

(2) A person in a boat floating on public waters, for purposes of hunting or fishing from the boat, drops an anchor, which comes to rest on the submerged private property. The boat is steered into position and the anchoring is accomplished without leaving the boat. Has the person committed an entry onto the private property within the meaning of the criminal trespass statute?

(3) A person in a boat floating on public waters ties the boat within or alongside a fixed hunting blind located on the submerged private property, for purposes of hunting or fishing from the boat. The boat is steered into position and the tie-off is accomplished without leaving the boat. Has the person committed an entry onto private property within the meaning of the criminal trespass statute?


(4) A person in a boat floating on public waters anchors, ties off, or beaches the boat in the manner described above, for other lawful purposes (for example: navigation, outdoor photography). Has the person committed an entry onto private property within the meaning of the criminal trespass statute?

I have posed these questions in the hypothetical. However, similar situations are often encountered by state game wardens and tend to generate friction between landowners and boaters. The potential for conflict is readily apparent. Therefore, your opinion on these matters would be appreciated.

Honorable Dan Morales  
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If further information is needed, please contact Staff Attorney Boyd Kennedy at 512/389-4584. Thank you for your assistance.

Sincerely,



Andrew Sansom  
Executive Director

AS:BK:mh